BURAK & ANDERSON & MELLONI PLC

Counsellors at Law

Michael L. Burak*
Jon Anderson
Thomas R. Melloni*
Michael B. Rosenberg*
Shane W. McCormack*‡
W. Scott Fewell□
Anja Freiburg
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Burlington, Vermont 05402-0787
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*Also admitted in New York
**Also admitted in Maryland
*Also admitted in the District of Columbia
‡Also admitted in Massachusetts
□Also admitted in Connecticut & Pennsylvania

March 24, 2008

MAR 2 5 2008

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Steven L. Johnson, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Lieutenant General Robert L. Van Antwerp
Chief of Engineers and Commanding General
United States Army Corps of Engineers
441 G Street N.W.
Washington, D.C. 20314

Robert W. Varney
Region 1 Administrator
EPA New England, Region 1
1 Congress Street, Suite 1100
Boston, MA 02114-2023

Colonel Curtis L. Thalken
Commander and District Engineer
New England District
United States Army Corps of Engineers
686 Virginia Road
Concord, MA 01742-2751

Re: Notice of Intent to Sue Regarding the No-Jurisdiction Determination for 4-Acre Wetland Adjacent to Mountain View Drive in Colchester, Vermont

Gentlemen:

This letter constitutes a Notice of Intent to Sue the United States Army Corps of Engineers (the "Army Corps"), and the United States Environmental Protection Agency ("EPA") pursuant to Section 505(a)(1) and (2) of the Federal Water Pollution Control Act (the "Clean Water Act"), 33 U.S.C. § 1365(a)(1) and (2), to challenge as possibly unsupported by substantial evidence and contrary to applicable law, the Army Corps' February 13, 2008 determination that a four-acre wetland on Mountain View Drive in Colchester, Chittenden County, Vermont is not subject to the Clean Water Act because it purportedly is "isolated" and therefore is not a "navigable water" pursuant to 33 U.S.C. § 1344(a) or a "water of the United States".[1] The Corps' decision that the construction proposed in or near such wetland would not involve any temporary or permanent fill may also be challenged.

[1] Because EPA is ultimately responsible for the protection of wetlands, *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (7th Cir. 1983), and the Army Corps acts as EPA's agent, pursuant to a Memorandum of Understanding, when it renders wetland jurisdictional determinations, both entities are subject to suit under 33 U.S.C. § 1365(a)(2) when the Corps fails to make reasoned wetland determinations and the EPA Administrator fails to exercise the duty of oversight imposed by 33 U.S.C. § 1344(c). *National Wildlife Federation v. Hanson*, 859 F.2d 313 (4th Cir. 1988).

The waters of the United States at issue are located on land owned or controlled by Lake Champlain Transportation Company and/or Ray Pecor and are known as Lot 5 in the Meadows Industrial Park on the westerly side of Mountain View Drive in Colchester. Costco Wholesale, Inc. ("Costco") proposes construction on the edge of such wetland. The water is a wetland identified on a plan entitled "Wetland Plan for Lot #5", dated May 18, 2006, and submitted on behalf of Costco Wholesale Corporation by Trudell Consulting Engineering and submitted to the Army Corps in support of a request for a no-jurisdiction determination for that wetland. The waters at issue also include tributaries of Sunderland Brook and the Winooski River adjacent to the subject property.

Costco proposes a retaining wall and a gasoline station on the edge of such wetland, which may cause irreparable harm to the wetland, its function and values and may require the placement of fill in the wetland. R.L. Vallee, Inc., as a neighboring property owner whose property overlooks and abuts such wetland, would be adversely affected and harmed by any destruction or encroachment of the wetland. R.L. Vallee, Inc. relies on the Army Corps to fully implement the Clean Water Act's protection of wetlands and other waters of the United States.

The Army Corp's No-Jurisdiction Determination for the Wetland on Lot 5 May Not Be Supported by Substantial Evidence and It May Be Inconsistent with Applicable Law.

There are two separate bases for Army Corp's jurisdiction over the wetland: (1) The wetland on Lot 5 borders and abuts directly an unnamed tributary of Sunderland Brook, a tributary of the Winooski River, a navigable water, and is therefore "adjacent" to a water of the United States under 33 C.F.R. § 328.3(a)(7); and (2) the degradation or destruction of the wetland on Lot 5 could degrade the Winooski River and Sunderland Brook, an impaired water on Vermont's Clean Water Act § 303(d) list, and could affect interstate commerce on that river within the meaning of 33 C.F.R. § 328.3(a)(3). The Army Corps considered only the first basis of jurisdiction and erroneously concluded that the wetland on Lot 5 is not a "water of the United States" and does not drain beyond the boundary of the Meadow Industrial Park property. The Army Corps' failure to consider the other bases for jurisdiction was arbitrary.

<u>The Army Corps Relied On an Incorrect Legal Standard and Ignored Relevant Evidence</u>

The Clean Water Act prohibits the discharge of dredge or fill material from a point source into the waters of the United States except pursuant to and in compliance with a permit issued by the Army Corps. *See* 33 U.S.C. § 1311(a); 33 U.S.C. § 1344. Pursuant to 33 C.F.R. § 328.3(a), waters of the United States include tributaries of navigable waters and their adjacent wetlands. The Army Corps determines the landward extent of tributaries of navigable waters based on the tributary's "ordinary high water mark," and wetlands are "adjacent" to these tributaries if they are "bordering, contiguous, or neighboring." 33 C.F.R § 328.3(c).

The Army Corps may have committed legal error and acted arbitrarily and capriciously in classifying the wetland on Lot 5 as "isolated," and thus not subject to Section 404 Clean Water Act jurisdiction. The no-jurisdiction letter states that the determination was based on a review of the administrative record and various maps.

Finally, the Army Corps' no-jurisdiction determination contradicts, without any explanation, compelling evidence that the wetland on Lot 5 is not "isolated" but is hydrologically connected to the Winooski River, a navigable water of the United States. R.L. Vallee, Inc. can demonstrate that the wetland on Lot 5 is hydrologically connected to the Winooski River. *See, e.g.*, Attachment 1 hereto. Accordingly, the wetland is subject to Army Corps jurisdiction and the Army Corps acted arbitrarily in failing to require Costco to obtain a permit prior to its construction of a gasoline station and retaining wall in or adjacent to the wetland on Lot 5.

The Army Corps Acted Arbitrarily In Failing to Consider Whether It Has Jurisdiction Over the Wetland on Lot 5 Pursuant to 33 C.F.R. § 328.3(a)(3)

Included within the Army Corps' definition of "waters of the United States," are "all other waters whose "use, degradation or destruction" could "affect interstate or foreign commerce. . . ." 33 C.F.R. § 328.3(a)(3). This jurisdictional basis does not depend on whether a wetland is hydrologically connected or otherwise adjacent to a navigable water. The wetland on Lot 5 clearly falls within this definition of "other waters" of the United States. As set forth above, sediment and silt flowing from the wetland has already had an adverse impact on a channel of interstate commerce—the Winooski River, which drains into Lake Champlain, and Sunderland Brook, an impaired water.

Clearly, the degradation or destruction of the wetland on Lot 5 creates a potential for exacerbating adverse impacts on the Winooski River or creating new ones. The wetland presently stores storm water run-off and filters some sediments and pollutants from the water flowing into it from the Costco property and other areas. Excavating or filling in the wetland and destroying its vegetation will likely diminish its storage and filtration functions and cause even more silt and sediment to flow to the Sunderland Brook and the Winooski River. Development of a gasoline station, construction of a retaining wall and encroaching on the Lot 5 wetland may cause greater surges of storm water run-off containing pollutants from paved areas and excess nutrients from landscaped areas, all of which will end up in the Winooski River. Any excess nutrients in the river may increase the level of pollutants in the already impaired Sunderland Brook.

In sum, whether or not the wetland on Lot 5 is adjacent to the Winooski River, the Army Corps should have asserted jurisdiction over it because its destruction or degradation could affect interstate commerce under 33 C.F.R. § 328(a)(3).

We hope that you will review the no-jurisdiction determination in light of the considerations raised here, including the evidence provided in Attachment 1 hereto. If at the

close of the 60-day notice period, you have not reconsidered and vacated that determination, R.L. Vallee, Inc. intends to file a citizen suit against the Army Corps and EPA pursuant to 33 U.S.C. § 1365(a), seeking declaratory and injunctive relief, and the recovery of attorney fees, expert witness fees, and costs of litigation, as provided by 33 U.S.C. § 1365(d).

Very truly yours,

Jon Anderson, Esq.
David W. Rugh, Esq.
Burak Anderson & Melloni, PLC
P.O. Box 787
Burlington, VT 05402-0787
(802) 862-0500

JTA\DWR\alb

Enclosure

cc: Hon. Michael Mukasey, Attorney General of the United States, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530

Amy Norris, Water Quality Division, Vermont Agency of Natural Resources, 111 West Street, Essex Junction, VT 05452

Laura Pelosi, Commissioner, Department of Environmental Conservation, 103 South Main Street, Waterbury, VT 05671

George Crombie, Secretary, Vermont Agency of Natural Resources, 103 South Main Street, Waterbury, VT 05671

Mark Hall, Counsel for Costco Wholesale, Inc., Paul, Frank & Collins, P.C., P.O. Box 1307, Burlington, VT 05402-1307

Lake Champlain Transportation Co., c/o Ray Pecor, King Street Dock, Burlington, VT 05401

Heindel & Noyes, Inc.
P.O. Box 4503 Burlington, VT 05406-4503

- Consulting Hydrogeologists
- Engineers
- Environmental Scientists

Voice 802-658-0820/Fax 802-860-1014

Extension 42

March 12, 2008

Ms. Amy Norris
Wetland Specialist
Vermont Agency of Natural Resources
111 West Street
Essex Jct., VT 05452

Re: Costco Wholesale, Colchester, Vermont

Dear Amy:

We have been retained by the attorney for Timberlake Associates, LLP, a landowner near Costco Wholesale in Colchester. They are concerned about degradation of the surface and groundwaters and the wetland system in this area, which they share with Costco and others.

With the assistance of Errol Briggs, we have reviewed the Costco development plans, Jeff Severson's wetland delineation, and your correspondence dated October 1, 2007. For reasons offered below, we would ask that you revisit this project with a more critical eye.

In summary, we have four areas of concern:

- The wetlands at the project site are more extensive than shown and underlay the proposed gasoline facility.
- The wetlands are part of a larger wetland complex in this area and appear to be contiguous with class 2 wetlands to both the north and south of the project site and should be protected under the Vermont Wetland Rules.
- The project stormwater design will divert significant volumes of stormwater recharge away from the wetland at the project site.
- There is no buffer between the gasoline sales facility and the wetland complex for when a leak to groundwater eventually occurs.

Site Wetlands

The development plan for the Costco project includes a wetland delineation conducted by Jeff Severson in 2000 and modified in 2005. We have digitized that information in the attached maps 1 and 2. We have also digitized the wetlands that were identified at the project site in 1993, of which 0.93 acre was previously impacted for the original Costco project under an earlier Water Quality Certificate and a federal general permit,.

Because of winter conditions and lack of permission to examine the soils at the project site, we have examined other public sources of information concerning the hydrology of the site and examined the site vegetation and drainage from public vantage points.

Attachment 1 is a section of a 1989 site plan we copied from Act 250 files (#4C0288-18) for the project site, prior to the Costco development. It shows the adjoining parcel labeled as "Ray's Mobile Homes, Inc." which we understand to be the Pecor land included with the current Costco project. This plan shows a driveway, culvert, what appear to be two berms, and an oval area defined by contour "311" with wetland symbols.

This area matches very closely an oval area seen in the state's 2004 high resolution black & white and color orthophotos (see attachments 2 and 3). This area appears in these photos to be a shallow, wet area with emergent vegetation. The stalks of this vegetation were readily apparent earlier this winter.

This shallow, wet area was created prior to 1989, the wetland rules, and the Costco facility and, while we assume it is man-made, it does not appear to have been designed as a regulatory stormwater feature. It also does not appear to be a deep water pond. Comparing the elevation of 311 with the adjoining elevations of the Severson wetlands, it certainly appears to be at or below the same wetland elevation. Furthermore, given the small volume of materials in the adjoining berms, this area may well have been part of the larger natural wetland area prior to being excavated. Man-made or not, this area appears to be a wetland.

To further understand the hydrology of this area, we examined the state's LIDAR elevation data that was collected at the same time as the high resolution orthophotos. This data is on a ten foot grid and is stated to be accurate to within 6 inches vertically. We separated and color coded that data by one foot increments. Then, after we shifted the one foot increments by 0.5 foot (eg., one layer is 110.5 to 111.5), we observed that this elevation data closely matched the upland islands in the development plan, as seen in map 1. This would make sense as this area is very uniform with sandy soils, so ground elevation should play an important role in soil saturation.

We then used the LIDAR elevation data as a first approximation of wetland hydrology, as shown by the dashed blue line in map 1. At the project site, in the vicinity of the oval wetland area mentioned above, this elevation data confirms the contour data in the older plan. Near the western, downgradient edge of the Severson wetland, we believe the

wetland occurs at approximately 110.5 feet, based on hydrology. At the eastern edge, near the Costco parking area, we believe the wetland occurs between 111.0 feet and 111.5 feet, based on hydrology. We then transferred these wetland lines to the black & white orthophoto (see map 2) and examined the features more closely and made minor adjustments.

Based on this analysis of the LIDAR data, it would appear that Severson's delineation excluded this oval, wet area and what appears to be a grassy channel below it, (and perhaps another small area near the driveway). We estimate approximately 14,500 square feet of additional wetland by this method. From the road, it is apparent that this shallow, wet area contained reedy vegetation that was cut down. Even without a soil coring, this data leaves little doubt in our minds that this basin and drainage is wetland as defined by the Vermont Wetland Rules and the Corps' 1987 Delineation Manual.

The only explanation we can think of for Severson omitting this area is that it appears to be man-made. But while such distinction may be important as to federal wetland jurisdiction, our understanding is that it has no bearing on wetland delineation or state wetland classification and protection. Furthermore, we think it is important to note that this basin and channel were never constructed as a required stormwater feature, even if it does now provide such benefits for the existing parking areas. Rather we believe this was a simple excavated hollow in an existing wetland, that over time has continued to return to a natural condition. We see no reason why its wetland status and water quality functions should not be protected.

Class 2 Wetlands

Using the same LIDAR elevation data and high resolution orthophotos, as well as information from other development plans and a roadside examination, we explored the extent of the larger wetland complex and possible contiguity to nearby class 2 wetlands. We acknowledge that this is challenging during winter conditions.

The class 2 wetlands in the area, as shown in the state's GIS data, are shown on maps 1 and 2. In particular, note the class 2 wetlands along the channel of Sunderland Brook to the north and a separate class 2 wetland to the south of Interstate 89.

We believe the LIDAR data confirms what appears to be obvious in the field; that the meadows on either side of the access road to Costco were all part of the same wet meadow and are surely contiguous through the sandy soils under the access road. A visual examination of the riparian corridor further north reveals what appears to wetland vegetation extending from the stream channel all the way to the class 2 wetland. We are not certain how far the wetlands may extend up the hill on the west side of the channel.

Turning to the south, the LIDAR elevation data shows that the wet soils on the south side of the interstate highway are at the same elevation. Our understanding is that the south side of the interstate is connected not only by a pipe in roughly the position of the old

stream channel (seen on the USGS map, attachment 4), but through the same sandy subsoils below the built up interstate. You can see this pre-existing soil and site condition in the 1962 aerial photo used for the SCS soil survey (attachment 5), which show the extent of the Au Gres soils (Au) throughout this area.

Our understanding is that the strip bordering on the south side of the interstate has been designated by others as class 2 wetlands (we noted such designation on a sidewalk plan along Route 7 for the Town of Colchester), presumably because they connect to the class 2 wetland on the south side of the town road as seen on maps 1 and 2.

In your letter of October 1, 2007, you made no independent classification, but relied upon a previous letter by Padraic Monks. Mr. Monks August 17, 1999 letter (see attachment 6), likewise indicates that he relied upon a 1992 agency review of the classification. We have a 1992 agency memorandum from Cathy O'Brien to the agency's land use attorney, dated December 7, 1992 (see attachment 7) that states "there is a Class Three wetland on this site." It does not reference any methodology to support the classification, nor does it even indicate whether Ms. O'Brien attempted to make such a field determination. She may have simply made some assumptions or relied upon information from the applicant at that time.

We also note that there was an agency policy regarding wetland contiguity along channels (if the wetlands were less than 20 feet wide for a certain length, as we recall) that has since been dropped and Ms. O'Brien's classification may have also reflected such outdated policy or thinking.

Regardless, while we can understand why the agency would respect previous staff rulings with regard to past development projects that have been completed, we do not see any reason for the agency to be bound by outdated assessments as they apply to future development projects. More importantly, we do not see anything in the Vermont Wetland Rules that would support such a position. Only the Water Resources Board (now the WR Panel of the Natural Resources Board) can issue a formal, binding wetland classification.

Wetland Recharge

You should be aware that the proposed stormwater plan for the Costco project will involve diverting the drainage flows which currently feed the wetland in question. The north parking area and roadway (the areas closest to Route 7) will be collected in a pipe and discharged directly to Sunderland Brook behind the nearby hotel, bypassing the wetland. The west parking area (closer to I-89) will all be redirected to a storm pond which will in turn discharge to a Winooski River drainage, away from the wetland.

We have raised this issue with the Stormwater Management Section with regard to the Recharge Standard in the Vermont Stormwater Rules, but it could be of equal concern with regard to these class 2 wetlands.

Underground Storage Tanks

Finally, we are concerned about the lack of a buffer between the proposed gasoline filling area, with 90,000 gallons of storage, and the retained wetlands, class 2 or otherwise. In our experience, even with modern tanks and early warning equipment, it is only a matter of time before free product (in this case, gasoline) is released into the ground, and gasoline is a more soluble and potentially harmful threat.

As the soils at the proposed gasoline facility are shallow to groundwater and porous in nature, free product will be able to move more quickly and farther in the groundwater than it otherwise might, prior to discovery. Based on the LIDAR elevation data, we would expect any such release to flow toward the wetlands.

We think that it would be prudent to require an upland buffer between the gasoline facility and the wetlands so as to allow a greater opportunity to access and recover plumes of free product without involving or filling the wetlands. The 50 foot class 2 wetland buffer would make sense in this regard.

Based on the above information, we believe that you should reconsider your October 1, 2007 letter, and more carefully visit the wetland delineation, the wetland classification, the wetland recharge, and the wetland buffer issues.

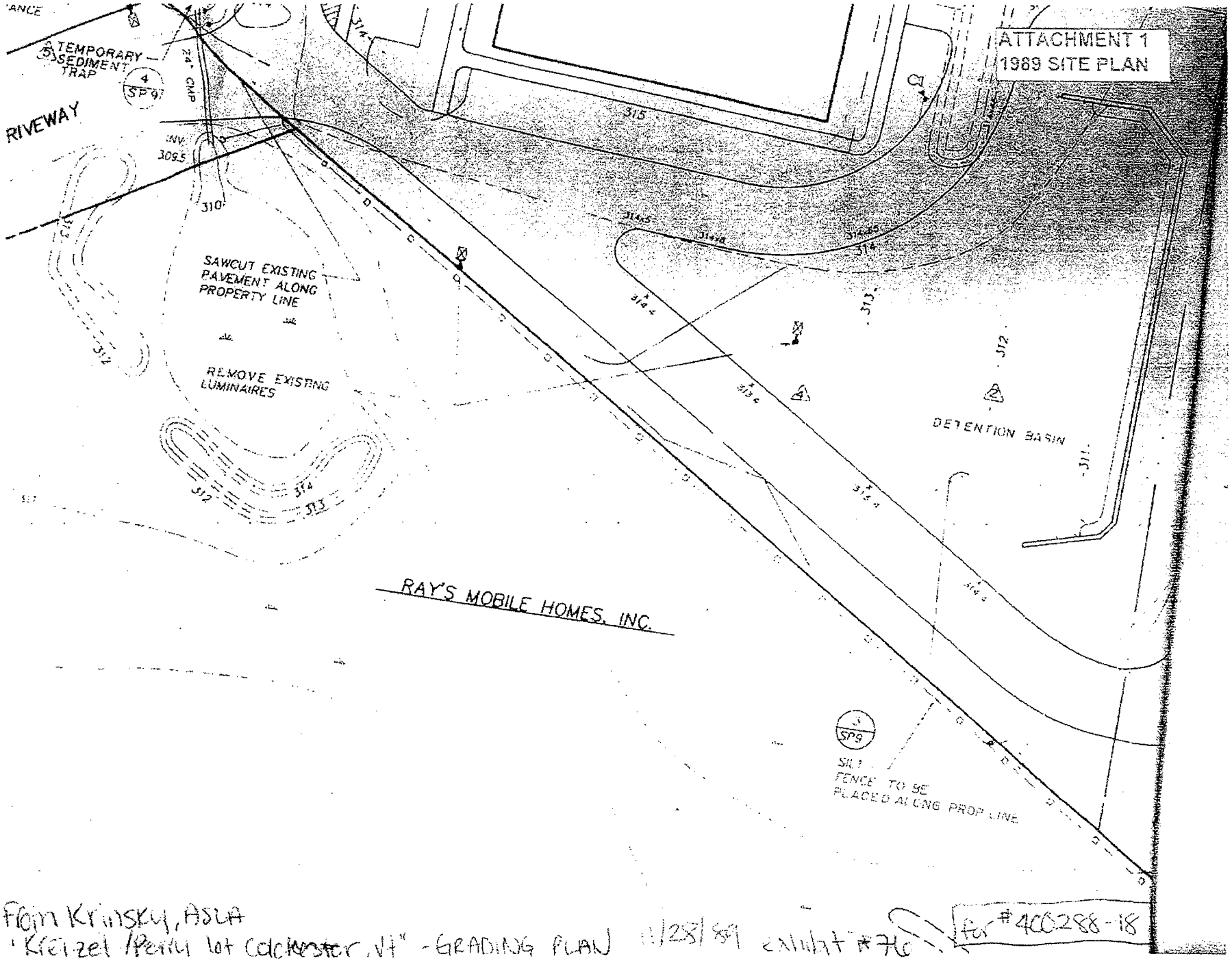
We would request that we be invited to participate in any further discussions or site inspections regarding these wetlands.

Thank you for considering our input.

Cordially yours,
HEINDEL & NOYES

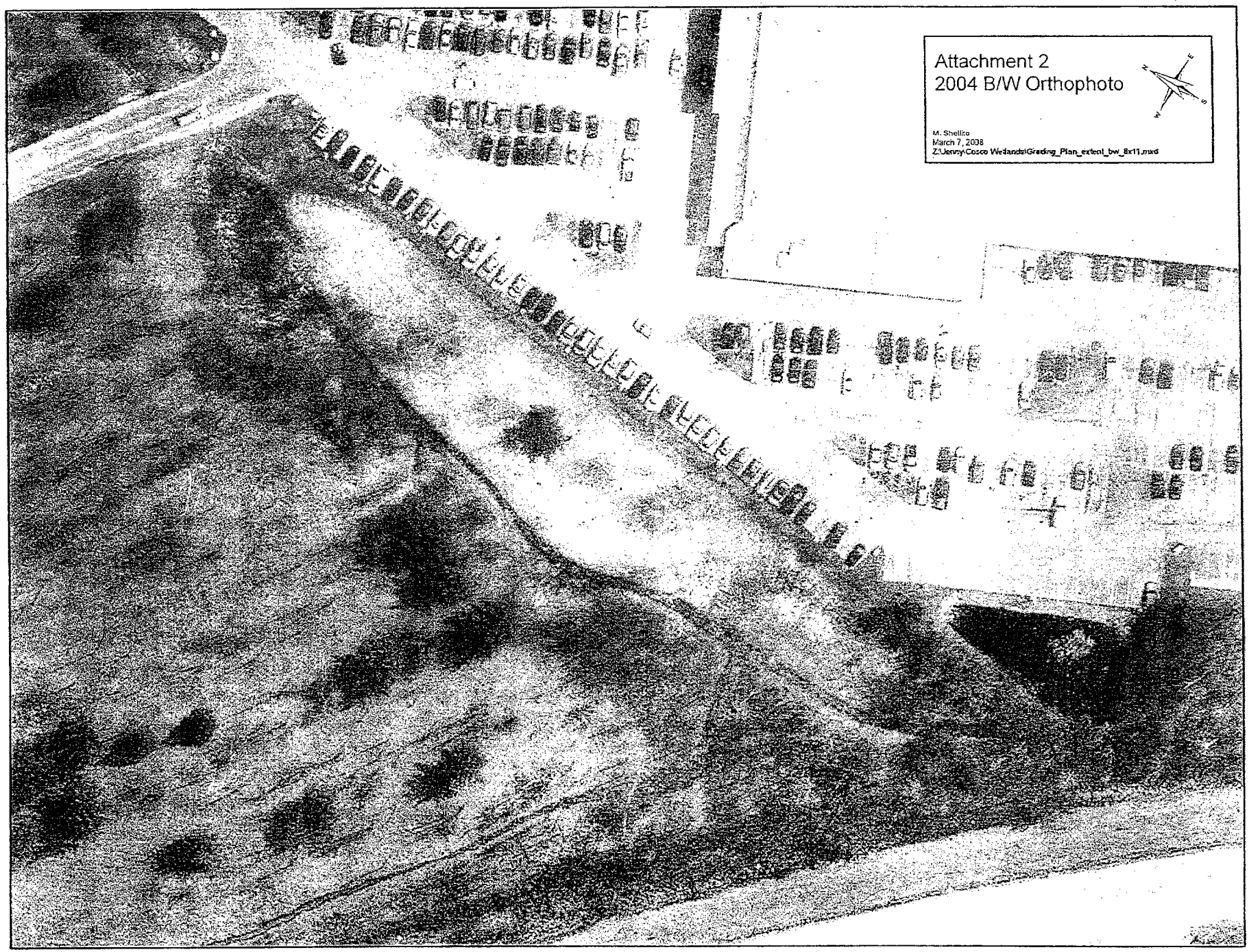
Anthony T. Stout
Senior Planner

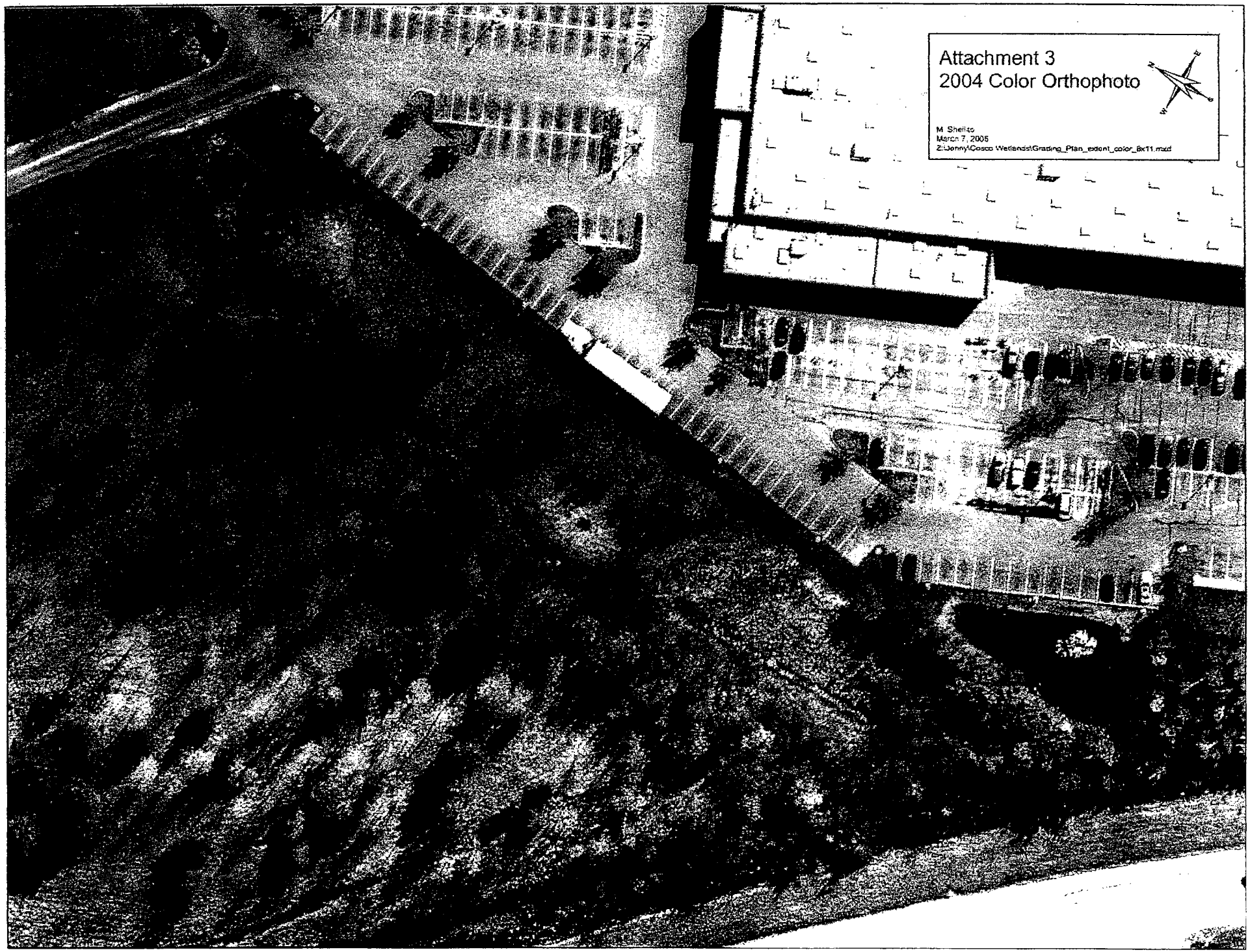
Encl.
cc Timberlake Associates, LLP
Jeff Severson
David L. Grayck, Esq.

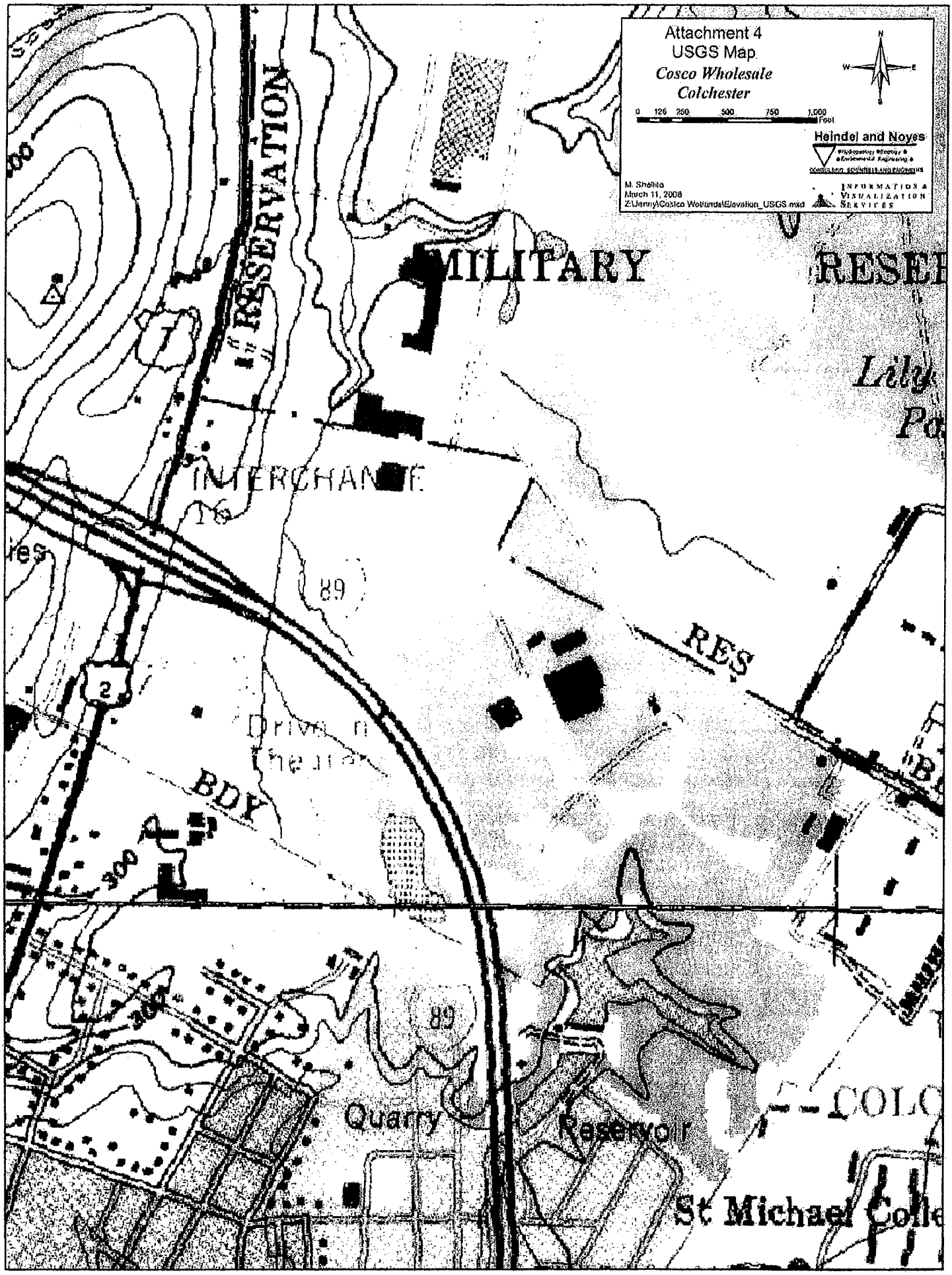


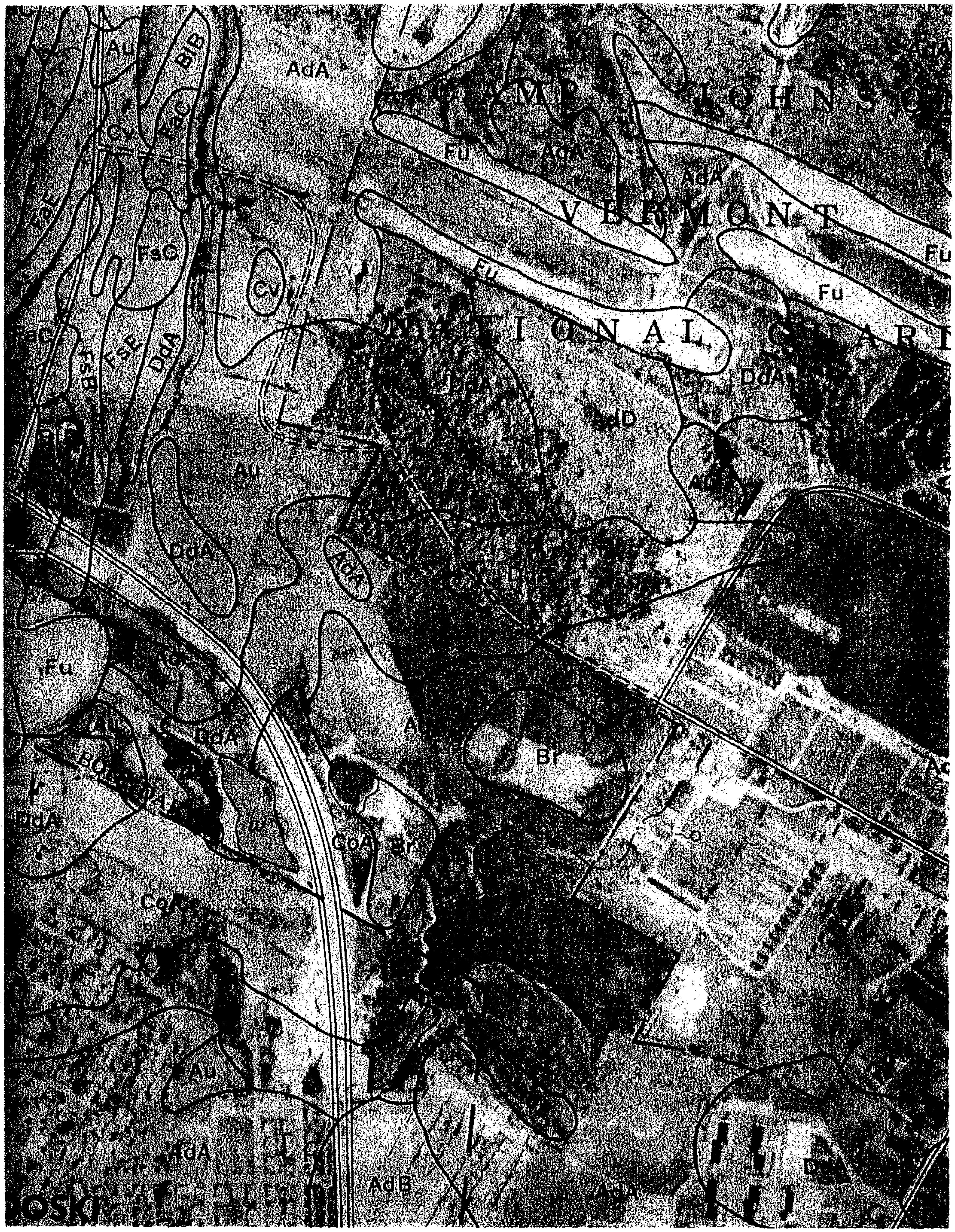
From Krinsky, ASLA
"Kreizel Penny lot Colchester, Vt" - GRADING PLAN 11/23/89 exhibit #7C

for #4C0288-18


Attachment 2
2004 B/W Orthophoto
M. Shellito
March 7, 2008
Z:\Jenny\Cosco Wetlands\Grading_Plan_extent_bw_8x11.mxd


Attachment 3
2004 Color Orthophoto
M Shellito
March 7, 2005
Z:\Jenny\Cosco Wetlands\Grading_Plan_edont_color_8x11.mxd


Attachment 4
USGS Map
Cosco Wholesale
Colchester
0 125 250 500 750 1,000 Feet
Heindel and Noyes
M. Shallia
March 11, 2008
Z:\Jenny\Costco Wetlands\Elevation_USGS.mxd
INFORMATION & VISUALIZATION SERVICES
MILITARY
RESERVATION
INTERCHANGE
RES
BDY
Quarry
Reservoir
St Michael Colle



VERMONT
AdA
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ATTACHMENT 6

State of Vermont

Department of Fish and Wildlife
Department of Forests, Parks and Recreation
Department of Environmental Conservation
State Geologist
RELAY SERVICE FOR THE HEARING IMPAIRED
1-800-253-0191 TDD-Voice
1-800-253-0195 Voice-TDD

ROUTING
GENERAL
TO NOTED DATE
Padraic
Dist Elix
SUSPENDED

AGENCY OF NATURAL RESOURCES
Department of Environmental Conservation
WATER QUALITY DIVISION
103 South Main Street
Building 10 North
Waterbury, VT 05671-0408

FAX 802-241-3287
TEL 802-241-3770

August 17, 1999

Mr. Ray Picor
King Street Dock
Burlington, VT 05401

RE: Costco Warehouse; Wetlands File #92-192

Dear Ray,

I am writing to follow up on our site visit on August 11, 1999. During this visit we discussed the proposed expansion of the Costco parking area onto your adjacent lot. As you are aware, portions of the subject lot contain wetland.

A previous review of the Costco facility by our office in 1992 determined that the wetlands in the proposed project area are considered Class Three and are therefore not protected under the Vermont Wetland Rules. However, the wetlands are under Act 250, and by the U.S. Army Corps of Engineers. Although it is possible that there are functions provided by the wetland that are protected by Act 250, it is more likely that the Corps' review is going to result in a redesign of the project.

Once a proposal that is acceptable to the Corps is developed, I respectfully request that you submit a copy for our review. Please call me at (802) 241-3763 if you have any questions.

Sincerely,

Padraic Monks
District Wetlands Ecologist

picor_l1.wpd

ATTACHMENT 7

Agency of Natural Resources
Department of Environmental Conservation

Water Quality Division
Building 10 North, 2nd Floor
802-244-6951

MEMORANDUM

To: Kurt Janson, Land Use Attorney

From: Cathy O'Brien, Assistant Wetlands Coordinator

Date: December 7, 1992

Subject: Costco Wholesale, Hercules Drive, Colchester
Act 250 # 4C0288-19

I am reviewing the above referenced project for wetland impacts. There is a Class Three wetland on this site. To date, we have not received plans that include an accurate wetland delineation. As soon as we receive these plans, I will need to either issue or waive a 401 Water Quality Certification for the placement of fill in the wetland. If wetland impacts are greater than one acre, the applicants will also need to apply for an individual permit from the Army Corps of Engineers. They have been in contact with Marty Abair with the Corps of Engineers.

The most important function of the wetland on site is providing water quality maintenance (Criterion 1B). As the existing grassed and forested area become converted to impervious surfaces and parking areas, the need for water quality treatment will increase. I will review impacts to this function in the Water Quality Certification. Please call me if you have further questions or comments.

cc: Lou Borie, District Coordinator

Higher Elevation Data Excluded from Analysis
2004 LIDAR Elevation Data
Coxco Wholesale
Cobblestone
Legend

DEPARTMENT OF THE ARMY
NEW ENGLAND DISTRICT, CORPS OF ENGINEERS
696 VIRGINIA ROAD
CONCORD, MASSACHUSETTS 01742-2751

REPLY TO:
ATTENTION OF:

13 FEB 2008

Regulatory Division
CENAE-R-PEC-62
File Number: NAE-2007-3359

Mr. Renee Hanson
Costco Wholesale
14590 Horseshoe Drive, Suite 150
Sterling, VA 20166

Dear Mr. Hanson:

We have determined that a Department of the Army permit is not required for your proposed project. Our determination is based on the information described in your application and on the enclosed plans. The work involves the expansion of an existing building, construction of a gas station and reconstruction of Lower Mountain View Drive in Colchester, Vermont. The work is shown on the attached plans, in seven sheets, entitled "COSTCO WHOLESALE" (dated "11/16/2007"), "Wetland Plan For Lot #5" (dated "05/18/2006"), "Existing Conditions" (dated "11/16/2007"), "Site Plan" (dated "11/16/2007"), "Cross-Sections" (dated "01/15/08"), and "Erosion Prevention & Sediment Control Plan 2" (dated "11/16/2007").

Our regulatory jurisdiction encompasses all work in or affecting navigable waters of the United States under Section 10 of the Rivers and Harbors Act of 1899 and the discharge of dredged or fill material into all waters of the United States, including adjacent wetlands, as well as discharges associated with excavation and grading within those waters, under Section 404 of the Clean Water Act. Since your proposal does not include any of the aforementioned activities, a Department of the Army permit is not required.

Our Corps of Engineers permit process does not supersede any other agency's jurisdiction. Therefore, if other Federal, State, and/or local agencies have jurisdiction over your proposed activity, you must receive all other applicable permits before you can begin work. Please note that performing work within our jurisdiction without a Corps of Engineers permit can result in prosecution by the U.S. Government.

An approved jurisdictional determination (JD) is attached to this General Permit 7, verification letter. If you do not agree with the approved JD, you have the right to an administrative appeal under 33 CFR Part 331.

If you have any questions regarding this letter, please contact Michael S. Adams at (802) 872-2893.

Sincerely,

Frank J. Delgiudice
Chief, Permits & Enforcement Branch
Regulatory Division

Attachments

Copy furnished:
Ms. Debra A. Bell
Project Manager
Trudell Consulting Engineers
P.O. Box 308
Williston, Vermont 05495

MFR: Project will involve the expansion of an existing building, construction of a gas station and reconstruction of Lower Mountain View Drive in Colchester, Vermont. A concrete block retaining wall will be constructed along the wetland boundary. The work will not involve any temporary or permanent fill in any wetlands or waterway. The Corps has determined that the man-made sedimentation basin located on the property was created in the upland and is being used. There will be no work or fill in any water of the U.S. as a result of the proposal and we do not have jurisdiction over the project.

Senior Project Manager: MA

Branch Chief: M

APPROVED JURISDICTIONAL DETERMINATION FORM
U.S. Army Corps of Engineers

This form should be completed by following the instructions provided in Section IV of the JD Form Instructional Guidebook.

SECTION I: BACKGROUND INFORMATION

A. REPORT COMPLETION DATE FOR APPROVED JURISDICTIONAL DETERMINATION (JD): 13 FEB 2008

B. DISTRICT OFFICE, FILE NAME, AND NUMBER: New England District, Costco Wholesale; NAE-2007-3359

C. PROJECT LOCATION AND BACKGROUND INFORMATION:
State: Vermont County/parish/borough: Chittenden City: Colchester
Center coordinates of site (lat/long in degree decimal format): Lat. 44.5052219° N, Long. 73.1777680° E.
Universal Transverse Mercator: 18
Name of nearest waterbody: Unnamed Stream
Name of nearest Traditional Navigable Water (TNW) into which the aquatic resource flows: Winooski River
Name of watershed or Hydrologic Unit Code (HUC): 02010003
☒ Check if map/diagram of review area and/or potential jurisdictional areas is/are available upon request.
☐ Check if other sites (e.g., offsite mitigation sites, disposal sites, etc...) are associated with this action and are recorded on a different JD form.

D. REVIEW PERFORMED FOR SITE EVALUATION (CHECK ALL THAT APPLY):
☒ Office (Desk) Determination. Date: September 25, 2007
☒ Field Determination. Date(s): November 7, 2005

SECTION II: SUMMARY OF FINDINGS

A. RHA SECTION 10 DETERMINATION OF JURISDICTION.

There Are no *"navigable waters of the U.S."* within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329) in the review area. [*Required*]
☐ Waters subject to the ebb and flow of the tide.
☐ Waters are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.
Explain:

B. CWA SECTION 404 DETERMINATION OF JURISDICTION.

There Are *"waters of the U.S."* within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328) in the review area. [*Required*]

1. **Waters of the U.S.**
   a. **Indicate presence of waters of U.S. in review area (check all that apply):** [1]
      ☐ TNWs, including territorial seas
      ☐ Wetlands adjacent to TNWs
      ☐ Relatively permanent waters[2] (RPWs) that flow directly or indirectly into TNWs
      ☐ Non-RPWs that flow directly or indirectly into TNWs
      ☒ Wetlands directly abutting RPWs that flow directly or indirectly into TNWs
      ☐ Wetlands adjacent to but not directly abutting RPWs that flow directly or indirectly into TNWs
      ☐ Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs
      ☐ Impoundments of jurisdictional waters
      ☐ Isolated (interstate or intrastate) waters, including isolated wetlands

   b. **Identify (estimate) size of waters of the U.S. in the review area:**
      Non-wetland waters: linear feet: width (ft) and/or acres.
      Wetlands: approximately 4 acres.

   c. **Limits (boundaries) of jurisdiction** based on: 1987 Delineation Manual
      Elevation of established OHWM (if known):

2. **Non-regulated waters/wetlands (check if applicable):**[3]
   ☒ Potentially jurisdictional waters and/or wetlands were assessed within the review area and determined to be not jurisdictional.
   Explain: **Man-made sedimenation basin constructed in the upland.**

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[1] Boxes checked below shall be supported by completing the appropriate sections in Section III below.
[2] For purposes of this form, an RPW is defined as a tributary that is not a TNW and that typically flows year-round or has continuous flow at least "seasonally" (e.g., typically 3 months).
[3] Supporting documentation is presented in Section III.F.

SECTION III: CWA ANALYSIS

A. TNWs AND WETLANDS ADJACENT TO TNWs

The agencies will assert jurisdiction over TNWs and wetlands adjacent to TNWs. If the aquatic resource is a TNW, complete Section III.A.1 and Section III.D.1. only; if the aquatic resource is a wetland adjacent to a TNW, complete Sections III.A.1 and 2 and Section III.D.1.; otherwise, see Section III.B below.

1. **TNW**
   Identify TNW:

   Summarize rationale supporting determination:

2. **Wetland adjacent to TNW**
   Summarize rationale supporting conclusion that wetland is "adjacent":

B. CHARACTERISTICS OF TRIBUTARY (THAT IS NOT A TNW) AND ITS ADJACENT WETLANDS (IF ANY):

This section summarizes information regarding characteristics of the tributary and its adjacent wetlands, if any, and it helps determine whether or not the standards for jurisdiction established under *Rapanos* have been met.

The agencies will assert jurisdiction over non-navigable tributaries of TNWs where the tributaries are "relatively permanent waters" (RPWs), i.e. tributaries that typically flow year-round or have continuous flow at least seasonally (e.g., typically 3 months). A wetland that directly abuts an RPW is also jurisdictional. If the aquatic resource is not a TNW, but has year-round (perennial) flow, skip to Section III.D.2. If the aquatic resource is a wetland directly abutting a tributary with perennial flow, skip to Section III.D.4.

A wetland that is adjacent to but that does not directly abut an RPW requires a significant nexus evaluation. Corps districts and EPA regions will include in the record any available information that documents the existence of a significant nexus between a relatively permanent tributary that is not perennial (and its adjacent wetlands if any) and a traditional navigable water, even though a significant nexus finding is not required as a matter of law.

If the waterbody[4] is not an RPW, or a wetland directly abutting an RPW, a JD will require additional data to determine if the waterbody has a significant nexus with a TNW. If the tributary has adjacent wetlands, the significant nexus evaluation must consider the tributary in combination with all of its adjacent wetlands. This significant nexus evaluation that combines, for analytical purposes, the tributary and all of its adjacent wetlands is used whether the review area identified in the JD request is the tributary, or its adjacent wetlands, or both. If the JD covers a tributary with adjacent wetlands, complete Section III.B.1 for the tributary, Section III.B.2 for any onsite wetlands, and Section III.B.3 for all wetlands adjacent to that tributary, both onsite and offsite. The determination whether a significant nexus exists is determined in Section III.C below.

1. **Characteristics of non-TNWs that flow directly or indirectly into TNW**

   (i) **General Area Conditions:**
   Watershed size: Pick List
   Drainage area: Pick List
   Average annual rainfall: inches
   Average annual snowfall: inches

   (ii) **Physical Characteristics:**
   (a) Relationship with TNW:
   ☐ Tributary flows directly into TNW.
   ☐ Tributary flows through Pick List tributaries before entering TNW.

   Project waters are Pick List river miles from TNW.
   Project waters are Pick List river miles from RPW.
   Project waters are Pick List aerial (straight) miles from TNW.
   Project waters are Pick List aerial (straight) miles from RPW.
   Project waters cross or serve as state boundaries. Explain:

   Identify flow route to TNW[5]:
   Tributary stream order, if known:

[4] Note that the Instructional Guidebook contains additional information regarding swales, ditches, washes, and erosional features generally and in the arid West.
[5] Flow route can be described by identifying, e.g., tributary a, which flows through the review area, to flow into tributary b, which then flows into TNW.

(b) General Tributary Characteristics (check all that apply):

Tributary is:
- ☐ Natural
- ☐ Artificial (man-made). Explain:
- ☐ Manipulated (man-altered). Explain:

Tributary properties with respect to top of bank (estimate):
- Average width: feet
- Average depth: feet
- Average side slopes: Pick List.

Primary tributary substrate composition (check all that apply):
- ☐ Silts
- ☐ Sands
- ☐ Concrete
- ☐ Cobbles
- ☐ Gravel
- ☐ Muck
- ☐ Bedrock
- ☐ Vegetation. Type/% cover:
- ☐ Other. Explain:

Tributary condition/stability [e.g., highly eroding, sloughing banks]. Explain:
Presence of run/riffle/pool complexes. Explain:
Tributary geometry: Pick List
Tributary gradient (approximate average slope): %

(c) Flow:

Tributary provides for: Pick List
Estimate average number of flow events in review area/year: Pick List
Describe flow regime:
Other information on duration and volume:

Surface flow is: Pick List. Characteristics:

Subsurface flow: Pick List. Explain findings:
- ☐ Dye (or other) test performed:

Tributary has (check all that apply):
- ☐ Bed and banks
- ☐ OHWM[6] (check all indicators that apply):
  - ☐ clear, natural line impressed on the bank
  - ☐ changes in the character of soil
  - ☐ shelving
  - ☐ vegetation matted down, bent, or absent
  - ☐ leaf litter disturbed or washed away
  - ☐ sediment deposition
  - ☐ water staining
  - ☐ other (list):
  - ☐ the presence of litter and debris
  - ☐ destruction of terrestrial vegetation
  - ☐ the presence of wrack line
  - ☐ sediment sorting
  - ☐ scour
  - ☐ multiple observed or predicted flow events
  - ☐ abrupt change in plant community
- ☐ Discontinuous OHWM.[7] Explain:

If factors other than the OHWM were used to determine lateral extent of CWA jurisdiction (check all that apply):
- ☒ High Tide Line indicated by:
  - ☐ oil or scum line along shore objects
  - ☐ fine shell or debris deposits (foreshore)
  - ☐ physical markings/characteristics
  - ☐ tidal gauges
  - ☐ other (list):
- ☒ Mean High Water Mark indicated by:
  - ☐ survey to available datum;
  - ☐ physical markings;
  - ☐ vegetation lines/changes in vegetation types.

(iii) Chemical Characteristics:

Characterize tributary (e.g., water color is clear, discolored, oily film; water quality; general watershed characteristics, etc.).
Explain: Water is clear; water qulity is assumed to be good; water shed is lighly developed by widely spaced residential homes and gravel pit.

Identify specific pollutants, if known:

[6]A natural or man-made discontinuity in the OHWM does not necessarily sever jurisdiction (e.g., where the stream temporarily flows underground, or where the OHWM has been removed by development or agricultural practices). Where there is a break in the OHWM that is unrelated to the waterbody's flow regime (e.g., flow over a rock outcrop or through a culvert), the agencies will look for indicators of flow above and below the break.
[7]Ibid.

(iv) **Biological Characteristics. Channel supports (check all that apply):**
- ☐ Riparian corridor. Characteristics (type, average width):
- ☐ Wetland fringe. Characteristics:
- ☐ Habitat for:
  - ☐ Federally Listed species. Explain findings:
  - ☐ Fish/spawn areas. Explain findings:
  - ☐ Other environmentally-sensitive species. Explain findings:
  - ☐ Aquatic/wildlife diversity. Explain findings:

2. **Characteristics of wetlands adjacent to non-TNW that flow directly or indirectly into TNW**

(i) **Physical Characteristics:**

(a) General Wetland Characteristics:
Properties:
Wetland size: acres
Wetland type. Explain:
Wetland quality. Explain:
Project wetlands cross or serve as state boundaries. Explain:

(b) General Flow Relationship with Non-TNW:
Flow is: Pick List. Explain:

Surface flow is: Pick List
Characteristics:

Subsurface flow: Pick List. Explain findings:
- ☐ Dye (or other) test performed:

(c) Wetland Adjacency Determination with Non-TNW:
- ☐ Directly abutting
- ☐ Not directly abutting
  - ☐ Discrete wetland hydrologic connection. Explain:
  - ☐ Ecological connection. Explain:
  - ☐ Separated by berm/barrier. Explain:

(d) Proximity (Relationship) to TNW
Project wetlands are Pick List river miles from TNW.
Project waters are Pick List aerial (straight) miles from TNW.
Flow is from: Pick List.
Estimate approximate location of wetland as within the Pick List floodplain.

(ii) **Chemical Characteristics:**
Characterize wetland system (e.g., water color is clear, brown, oil film on surface; water quality; general watershed characteristics; etc.). Explain:
Identify specific pollutants, if known:

(iii) **Biological Characteristics. Wetland supports (check all that apply):**
- ☐ Riparian buffer. Characteristics (type, average width):
- ☐ Vegetation type/percent cover. Explain:
- ☐ Habitat for:
  - ☐ Federally Listed species. Explain findings:
  - ☐ Fish/spawn areas. Explain findings:
  - ☐ Other environmentally-sensitive species. Explain findings:
  - ☐ Aquatic/wildlife diversity. Explain findings:

3. **Characteristics of all wetlands adjacent to the tributary (if any)**
All wetland(s) being considered in the cumulative analysis: Pick List
Approximately ( ) acres in total are being considered in the cumulative analysis.

For each wetland, specify the following:

Directly abuts? (Y/N)	Size (in acres)	Directly abuts? (Y/N)	Size (in acres)

Summarize overall biological, chemical and physical functions being performed:

C. SIGNIFICANT NEXUS DETERMINATION

A significant nexus analysis will assess the flow characteristics and functions of the tributary itself and the functions performed by any wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical, and biological integrity of a TNW. For each of the following situations, a significant nexus exists if the tributary, in combination with all of its adjacent wetlands, has more than a speculative or insubstantial effect on the chemical, physical and/or biological integrity of a TNW. Considerations when evaluating significant nexus include, but are not limited to the volume, duration, and frequency of the flow of water in the tributary and its proximity to a TNW, and the functions performed by the tributary and all its adjacent wetlands. It is not appropriate to determine significant nexus based solely on any specific threshold of distance (e.g. between a tributary and its adjacent wetland or between a tributary and the TNW). Similarly, the fact an adjacent wetland lies within or outside of a floodplain is not solely determinative of significant nexus.

Draw connections between the features documented and the effects on the TNW, as identified in the *Rapanos* Guidance and discussed in the Instructional Guidebook. Factors to consider include, for example:

- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to carry pollutants or flood waters to TNWs, or to reduce the amount of pollutants or flood waters reaching a TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), provide habitat and lifecycle support functions for fish and other species, such as feeding, nesting, spawning, or rearing young for species that are present in the TNW?
- Does the tributary, in combination with its adjacent wetlands (if any), have the capacity to transfer nutrients and organic carbon that support downstream foodwebs?
- Does the tributary, in combination with its adjacent wetlands (if any), have other relationships to the physical, chemical, or biological integrity of the TNW?

Note: the above list of considerations is not inclusive and other functions observed or known to occur should be documented below:

1. **Significant nexus findings for non-RPW that has no adjacent wetlands and flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary itself, then go to Section III.D:

2. **Significant nexus findings for non-RPW and its adjacent wetlands, where the non-RPW flows directly or indirectly into TNWs.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D:

3. **Significant nexus findings for wetlands adjacent to an RPW but that do not directly abut the RPW.** Explain findings of presence or absence of significant nexus below, based on the tributary in combination with all of its adjacent wetlands, then go to Section III.D:

D. DETERMINATIONS OF JURISDICTIONAL FINDINGS. THE SUBJECT WATERS/WETLANDS ARE (CHECK ALL THAT APPLY):

1. **TNWs and Adjacent Wetlands.** Check all that apply and provide size estimates in review area:
   - ☒ TNWs: linear feet width (ft), Or, acres.
   - ☒ Wetlands adjacent to TNWs: acres.

2. **RPWs that flow directly or indirectly into TNWs.**
   - ☒ Tributaries of TNWs where tributaries typically flow year-round are jurisdictional. Provide data and rationale indicating that tributary is perennial:
   - ☒ Tributaries of TNW where tributaries have continuous flow "seasonally" (e.g., typically three months each year) are jurisdictional. Data supporting this conclusion is provided at Section III.B. Provide rationale indicating that tributary flows seasonally:

Provide estimates for jurisdictional waters in the review area (check all that apply):
- ☐ Tributary waters: linear feet width (ft).
- ☐ Other non-wetland waters: acres.
  Identify type(s) of waters:

3. **Non-RPWs[8] that flow directly or indirectly into TNWs.**
   ☐ Waterbody that is not a TNW or an RPW, but flows directly or indirectly into a TNW, and it has a significant nexus with a TNW is jurisdictional. Data supporting this conclusion is provided at Section III.C.

   Provide estimates for jurisdictional waters within the review area (check all that apply):
   - ☐ Tributary waters: linear feet width (ft).
   - ☐ Other non-wetland waters: acres.
     Identify type(s) of waters:

4. **Wetlands directly abutting an RPW that flow directly or indirectly into TNWs.**
   ☒ Wetlands directly abut RPW and thus are jurisdictional as adjacent wetlands.
   - ☒ Wetlands directly abutting an RPW where tributaries typically flow year-round. Provide data and rationale indicating that tributary is perennial in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW: **Wetland edge is the OHW of the unnamed stream that flows into Sunderland Brook that drains directley into the Winooski River a Section 10 waterway.Based on PM's and wetland consultant's kwowledge of the area, the stream has continuous flow year-round.**

   - ☐ Wetlands directly abutting an RPW where tributaries typically flow "seasonally." Provide data indicating that tributary is seasonal in Section III.B and rationale in Section III.D.2, above. Provide rationale indicating that wetland is directly abutting an RPW:

   Provide acreage estimates for jurisdictional wetlands in the review area: **4** acres.

5. **Wetlands adjacent to but not directly abutting an RPW that flow directly or indirectly into TNWs.**
   ☐ Wetlands that do not directly abut an RPW, but when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisidictional. Data supporting this conclusion is provided at Section III.C.

   Provide acreage estimates for jurisdictional wetlands in the review area: acres.

6. **Wetlands adjacent to non-RPWs that flow directly or indirectly into TNWs.**
   ☐ Wetlands adjacent to such waters, and have when considered in combination with the tributary to which they are adjacent and with similarly situated adjacent wetlands, have a significant nexus with a TNW are jurisdictional. Data supporting this conclusion is provided at Section III.C.

   Provide estimates for jurisdictional wetlands in the review area: acres.

7. **Impoundments of jurisdictional waters.[9]**
   As a general rule, the impoundment of a jurisdictional tributary remains jurisdictional.
   - ☐ Demonstrate that impoundment was created from "waters of the U.S.," or
   - ☐ Demonstrate that water meets the criteria for one of the categories presented above (1-6), or
   - ☐ Demonstrate that water is isolated with a nexus to commerce (see E below).

E. ISOLATED [INTERSTATE OR INTRA-STATE] WATERS, INCLUDING ISOLATED WETLANDS, THE USE, DEGRADATION OR DESTRUCTION OF WHICH COULD AFFECT INTERSTATE COMMERCE, INCLUDING ANY SUCH WATERS (CHECK ALL THAT APPLY):[10]
- ☐ which are or could be used by interstate or foreign travelers for recreational or other purposes.
- ☐ from which fish or shellfish are or could be taken and sold in interstate or foreign commerce.
- ☐ which are or could be used for industrial purposes by industries in interstate commerce.
- ☐ Interstate isolated waters. Explain:
- ☐ Other factors. Explain:

[8] See Footnote # 3.
[9] To complete the analysis refer to the key in Section III.D.6 of the Instructional Guidebook.
[10] **Prior to asserting or declining CWA jurisdiction based solely on this category, Corps Districts will elevate the action to Corps and EPA HQ for review consistent with the process described in the Corps/EPA *Memorandum Regarding CWA Act Jurisdiction Following Rapanos.***

Identify water body and summarize rationale supporting determination:

Provide estimates for jurisdictional waters in the review area (check all that apply):
- ☒ Tributary waters: linear feet width (ft).
- ☒ Other non-wetland waters: acres.
  - Identify type(s) of waters:
- ☒ Wetlands: acres.

F. NON-JURISDICTIONAL WATERS, INCLUDING WETLANDS (CHECK ALL THAT APPLY):
- ☒ If potential wetlands were assessed within the review area, these areas did not meet the criteria in the 1987 Corps of Engineers Wetland Delineation Manual and/or appropriate Regional Supplements.
- ☒ Review area included isolated waters with no substantial nexus to interstate (or foreign) commerce.
  - ☐ Prior to the Jan 2001 Supreme Court decision in "*SWANCC*," the review area would have been regulated based solely on the "Migratory Bird Rule" (MBR).
- ☒ Waters do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction. Explain:
- ☒ Other: (explain, if not covered above): **Man-made sedimenation basin constarcted in the upland.**

Provide acreage estimates for non-jurisdictional waters in the review area, where the sole potential basis of jurisdiction is the MBR factors (i.e., presence of migratory birds, presence of endangered species, use of water for irrigated agriculture), using best professional judgment (check all that apply):
- ☒ Non-wetland waters (i.e., rivers, streams): linear feet width (ft).
- ☒ Lakes/ponds: acres.
- ☒ Other non-wetland waters: acres. List type of aquatic resource:
- ☒ Wetlands: acres.

Provide acreage estimates for non-jurisdictional waters in the review area that do not meet the "Significant Nexus" standard, where such a finding is required for jurisdiction (check all that apply):
- ☒ Non-wetland waters (i.e., rivers, streams): linear feet, width (ft).
- ☒ Lakes/ponds: acres.
- ☒ Other non-wetland waters: acres. List type of aquatic resource:
- ☒ Wetlands: acres.

SECTION IV: DATA SOURCES.

A. SUPPORTING DATA. Data reviewed for JD (check all that apply - checked items shall be included in case file and, where checked and requested, appropriately reference sources below):
- ☒ Maps, plans, plots or plat submitted by or on behalf of the applicant/consultant: Plan done by Trudell Consulting Engineering, entitled "COSTCO WHOLESALE COOPERATION", dated "05/18/2006"..
- ☒ Data sheets prepared/submitted by or on behalf of the applicant/consultant.
  - ☒ Office concurs with data sheets/delineation report.
  - ☐ Office does not concur with data sheets/delineation report.
- ☒ Data sheets prepared by the Corps:
- ☒ Corps navigable waters' study:
- ☒ U.S. Geological Survey Hydrologic Atlas:
  - ☐ USGS NHD data.
  - ☒ USGS 8 and 12 digit HUC maps.
- ☒ U.S. Geological Survey map(s). Cite scale & quad name:1::4,000;Colchester, VT.
- ☒ USDA Natural Resources Conservation Service Soil Survey. Citation:
- ☒ National wetlands inventory map(s). Cite name:Colchester, VT.
- ☒ State/Local wetland inventory map(s):
- ☒ FEMA/FIRM maps:
- ☒ 100-year Floodplain Elevation is: (National Geodectic Vertical Datum of 1929)
- ☒ Photographs: ☒ Aerial (Name & Date):B&W 1999.
  - or ☐ Other (Name & Date):
- ☒ Previous determination(s). File no. and date of response letter:
- ☒ Applicable/supporting case law:
- ☒ Applicable/supporting scientific literature:
- ☒ Other information (please specify):

B. ADDITIONAL COMMENTS TO SUPPORT JD: Proposed project will involve the construction gas station on property off Lower Mountain View Drive in Colchester, Vermont. During a November 7, 2005 site visit the wetland boundary was inspected and accepted. The wetland direclty abutts an unnmaed RPW that drains into Sunderland Brook that flows into the Winooski River, a TNW.